IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 118 OF 1999.

1. Land Acquisition Officer
   and Deputy Collector (SDO),
   Margao, Goa.

2. The Executive Engineer,
   WD VI, (South Rd), P.W.D.,
   Fatorda, Margao, Goa. ... Appellants.

VERSUS

Shri Babooia Bogvanta Niaque,
Varsha, Villa Nova,
Colva, Salcete, Goa. ... Respondent.

Shri H.R. Bharne, Government Advocate for the Appellants.

Shri V.P. Thali, Advocate for the Respondent.

CORAM: N.A. BRITTO, J.

DATE: 21ST APRIL, 2004.

ORAL JUDGMENT:

The State of Goa through its L.A.O./Deputy Collector, Margao, and the Executive Engineer, Works Division VI has preferred the present appeal against the judgment/award dated 18.9.1999 of the learned District Judge, Margao in LAC No.54/97 (Reference Court for short).

2. Some facts are required to be stated to dispose of the present appeal.

3. By Notification dated 5.10.1990 issued under

section 4(1) of the Land Acquisition Act 1894 and published in Gazette dated 14.2.91 the Government acquired about 17045 sq.m. of land situated in village Colva for the purpose of construction of a road from St. Joao Mol via Toloi, Vanelim Chinchmorod in Village Panchayat of Colva in Salcete Taluka and as far as the respondent was concerned what was acquired was 348 sq.m. from No.15/3 and 800 sq.m. of land from survey No.49/0 of Colva village.

4. By award dated 28.2.1994 the L.A.O. awarded to the respondent compensation at the rate of Rs.4/- per sq.m. as regards the area of Survey No.15/3 and Rs.20/- per sq.m. as regards the area of Survey No.49/0. The respondent by his application dated 19.4.97 sought a reference to be made under Section 18 of the Act, inter alia, claiming compensation at the rate of Rs.150/- per sq.m. for the land of survey No.15/3 and Rs.275/- per sq.m. for the land of survey No.49/0 and the learned Reference Court by placing reliance on an Order of the Mamlatdar dated 31.5.1990 - Exh.12 fixed compensation payable to the respondent at the rate of Rs.150/- per sq.m. as regards the land of survey No.15/3 and Rs.120/- per sq.m. as regards the area of survey No.49/0.

5. Before the Reference Court the respondent

examined Baboi Naik (A.W.1)and produced the said order of the learned Mamlatdar dated 31.5.1990 (Exh.12). The respondent have has also produced a Sale Deed dated 28.8.91 and in support of the same had examined AW.2 Shri Kurtorkar. The said sale deed was in respect of a plot of land admeasuring 341 sq.m. surveyed under No.17/2 sold at Rs.275/- per sq.m. There is no dispute that the said Sale Deed was made pursuant to an agreement for sale dated 14.3.1990 which was also produced on behalf of the respondent (Exh.17).

6. The learned Reference Court referring to the said sale deed dated 28.8.91 - Exh.13 observed that although the said sale deed was executed pursuant to an agreement of sale, it had to be noted that the consideration had to be paid in various instalments. The learned Reference Court also observed that the said plot of sale deed - Exh.13 was purchased by a firm of builders for putting up buildings and the plot of the same was having a frontage to its entire width of 35 metres and came to the conclusion that the said plot of the sale deed - Exh.13 could not be considered as a comparable instance for the purpose of fixing the market value of the acquired land of survey No.15/3 and 49/0.

7. The first grievance made by learned Government Advocate Shri Bharne is that the Order dated 31.5.90 - Exh.12 was a consent order between a mundkar and bhatkar and was in respect of a house and land and therefore could not have reflected the price of land alone. Shri Bharne further submitted that there was no evidence to show as to what was the area of the house and what was the area of the land purchased by virtue of the said order.

8. As far as this aspect of the case is concerned, the learned Reference Court observed that though it was correct that the price of Rs.150/- per sq.m. was agreed between the parties, the price to be paid had to be the market value of the land in terms of section 15(3) of the Goa, Daman and Diu Mundkars (Protection from Eviction) Act, 1975 and therefore it could be safely concluded that the price of Rs.150/- per sq.m. which the mundkar had agreed to pay could not be more than the market price of the land at the relevant time. However, what the learned Reference Court lost sight of was the fact that the said order - Exh.12 reflected not only the price of the house but also of the land and not only that, it was arrived at by consent between the mundkar and his bhatkar and in such a situation it could not be said that the said

order - Exh.12 reflected the price which a willing purchaser was willing to pay in the open market. At the cost of repetition, it could be stated that the said order dated 31.5.90 - Exh.12 on the very face of it shows that the price paid of Rs.150/- per sq.m. included the cost of the mundcarial house as well as the land on which it was existing and therefore the said order could not have been taken as a basis for fixing the market value of the acquired land.

9. The second submission made by learned Government Advocatte Shri Bharne is that the respondent has not filed any appeal nor any cross objections against the finding of the learned Reference Court and has not placed reliance on the sale deed dated 28.8.91 - Exh.13.

10. Learned Advocate Shri Thali has referred to Order 41, Rule 33 of C.P.C. Rule 33 of Order 41 provides that the Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such

respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees: Provided that the Appellate Court shall not make any order under section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order. In my opinion, the submission of learned Advocate Shri Bharne cannot be accepted, and, it would be the duty of this Court as well to make an effort and find out whether any enhancement, if at all, could be granted to the respondent on the basis of the said sale deed dated 28.8.91 - Exh.13.

11. Before referring to the said sale deed dated 28.8.91 - Exh.13 in support of which AW.2 was examined, it is necessary to keep in mind two principles. The first is that the burden of proof that the amount awarded by the L.A.O. is not adequate is always on the claimant and the said burden is to adduce relevant and material evidence to establish that the acquired land was capable of fetching higher market value than the amount awarded by the L.A.O. or that the L.A.O. proceeded on a wrong premise or

applied a wrong principle of law. This principle has been laid down by the Hon'ble Supreme Court in the case of **Special Deputy Collector and another v. Kurra Sambasiva Rao and Others** (A.I.R. 1997 S.C., 2625). The other principle is that before a sale deed in a given case can be used as a guide to fix the price of the acquired land, it must be shown that the price of the sale deed is comparable to that of the acquired land. In this connection reference could be made to the case of **Saji Kuriakose and Another v. I.O.C. Ltd. and Others** (2001 (7) S.C.C. 650). In this case the Hon'ble Supreme Court has observed that comparable sales method of valuation is preferred because it furnishes the evidence for determination of the market value of the acquired land at which a willing purchaser would pay for the acquired land if it had been sold in the open market at the time of issue of notification under Section 4 of the Act, but there are certain factors which are required to be fulfilled and only on fulfilment of those factors the compensation can be awarded according to the value of the land reflected in the sales, The factors being, inter alia, ... (4) that the land covered by the sales must be similar to the acquired land; and (5) that the size of the plot of land covered by the sales comparable to the land acquired.

12. As far as the land of Survey No.49/0 is concerned, the respondent has led no evidence as to its nature or whether the same could be compared either with the plot sold by virtue of Exh.12 or to the land of Survey No.15/3. Except for a whisper that survey No.49/0 is at a distance of about 1/2 km. away, there is no further evidence led by the respondent to show its exact location or to show in which direction in relation to the property of survey No.15/3 it was situated or what was the nature of its land. It is true that the L.A.O. had awarded a higher rate of compensation to the land acquired of Survey No.49/0 and the respondent had also claimed a higher rate for the same but the learned Reference Court has in fact given a lower rate to the land acquired under survey no.49/0, but, unless the respondent had led evidence regarding the nature of the said property in relation either to land under Exh.12 or to the land under Exh.13 there was no question of the respondent being given any enhancement on the basis of either the order – Exh.12 or sale deed – Exh.13. As far as the plot of Exh.13 is concerned, the learned Reference Court has discarded the same because it was of a property which had a higher frontage of 35 metres road. The learned Reference Court has also discarded the same because the price in respect of the same was to be paid in instalments and

not only that it was purchased by a builder to put up a commercial building. In fact, it was stated by AW.2 that he had constructed three buildings of ground plus two floors and sold shops and residential flats. In my opinion and for the reasons assigned the sale deed dated 28.8.91 – Exh.13 was rightly discarded by the learned Reference court apart from the fact that the respondent had otherwise not led any evidence to show that the plot of the sale deed was comparable with the acquired property of survey No.15/3. In fact, the respondent did not even know what was the length and the breadth of the said 348 sq.m. which were acquired of Survey No.15/3 or for that matter the length and breadth of the entire survey No.15/3. It is true that at one stage the respondent stated that survey No.15/3 had an area of 21000 sq.m. but one does not know whether the said 21000 sq.m. also includes the area of survey No.17/2 which was sold to AW.2 Kurtorkar. Admittedly, in survey No.15/3 there were 6 mundcarial houses excluding the said mundcarial house of the said Custodio which was sold by virtue of the order of the Mamlatdar dated 31.5.90 – Exh.12 and the respondent has led no evidence whatsoever to show as to what was the area which was available to him to be used for construction purposes excluding the area of the said houses. An Effort was made to show that the land of survey No.15/3 and the land of survey No.17/2 at one

time were parts and parcels of the same property but I must hasten to add that it must have been ages back before the construction of the Colva-Margao road. The plot of sale deed dated 28.8.91 - Exh.13 appears to have been a plot without any encumbrance whatsoever and was abutting the said road and AW.2 purchased the same for commercial development. The plot of survey No.15/3 had mundcarial houses and as otherwise already stated, one does not know as to what was the balance area which was available to the respondent for its development apart from the said mundcarial houses including the house sold to the mundkar by sale deed - Exh.12. In such a situation, it ought to have been concluded that the respondent had failed to prove that the acquired land could at all be compared either with the plot of Exh.12 or for that matter with the plot of Exh.13 Both the said documents could not have been used as indicia for the purpose of fixing market value of the respondent's acquired land. In my opinion, the Reference ought to have been rejected on the failure of the respondent to produce cogent and reliable evidence that the acquired land could be compared with the land either of Exh.12 or of Exh.13.

13. In view of the above, the appeal deserves to succeed and the judgment/award of the learned Reference Court deserves to be set aside and

accordingly the same is hereby set aside. Considering the facts, there will be no order as to costs.

N. A. BRITTO, J.

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